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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 813

CLARENCE I. JUSTHEIM, *et al.*, *Petitioners*,

v.

DOUGLAS McKAY, Secretary of the Interior, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on January 5, 1956.

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. Jt. App. 40) is reported at 123 F. Supp. 560.

The opinion of the Court of Appeals for the District of Columbia Circuit (Case No. 12,561) is dated January 5, 1956, and is set out in Appendix "A", *infra*, and is reported in U.S. App. D.C. and in 229 F. 2d 29.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was made and entered on January 5, 1956 (R. 62; App. "A," *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Between April 1, 1938, and August 11, 1947, Petitioners filed fifty applications for oil and gas leases under the Mineral Leasing Act of 1920 (c. 85, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*). The lands covered by all of said applications, with the exception of portions of four thereof, cover lands claimed by the United States as well as by Petitioners to be in the marginal sea, that is, lands off the coast of California below low tide and outside the inland waters of the State of California.

The Secretary of the Interior affirmed[1] decisions of the Bureau of Land Management[2] rejecting said applications on the ground that the Mineral Leasing Act did not apply to submerged lands in the marginal sea. The District Court dismissed the Petitioners' complaint on the same premise[3] and this decision was affirmed by the Court of Appeals.[4]

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[1] See R. Jt. App. 30, 6-7, 19-25.

[2] See R. Jt. App. 30, 6, 11-18.

[3] See R. Jt. App. 40.

[4] See R. 58; App. "A," *infra*.

Accordingly, the only question presented is: Whether the Mineral Leasing Act of 1920, as amended, applied to and covered the leasing for oil and gas of submerged lands in the marginal sea at the time the Petitioners filed their respective applications for oil and gas leases as to such lands.

STATUTE INVOLVED

The pertinent portion of the Mineral Leasing Act of February 25, 1920, (c. 85, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*) is as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act * * *."

STATEMENT OF THE CASE

Suits were commenced September 30, 1949, in the District Court for the District of Columbia to obtain a review of decisions by the Department of the Interior to the effect that the Mineral Leasing Act of 1920 did not apply to submerged lands in the marginal sea and to obtain a declaratory judgment and injunctive relief. (R. Jt. App. 2) Jurisdiction of the trial court was invoked upon the grounds of diversity of citizenship, construction of a Federal Statute (28

U.S.C. 1331, 1332) general equity jurisdiction under the Declaratory Judgment Act (28 U.S.C. 2201) and Section 10 of the Administrative Procedures Act (5 U.S.C. 1009). The case was submitted to the trial court on the pleadings and the stipulation of the parties as a matter of law. (R. Jt. App. 31)

Between April 1, 1938, and August 11, 1947, the forty Petitioners filed fifty applications for oil and gas prospecting permits or leases under the said Mineral Leasing Act.

By decision dated September 8, 1947, (R. Jt. App. 11), the Director of the Bureau of Land Management rejected (along with a number of other applications) twenty-eight of the applications which had been filed by Petitioners, including the eleven which had been filed in 1938, the two which had been filed in 1939, the seven which had been filed in 1945, five of the six which had been filed in 1946 and three of the twenty-four which had been filed in 1947. By subsequent decisions dated respectively October 16, 1947, November 10, 1947, December 31, 1947, and February 18, 1948, said Director rejected the remainder of the applications which had been filed by Petitioners. (R. Jt. App. 6, 30)

Each of the Director's decisions was based upon the premise that said Mineral Leasing Act did not apply to submerged lands in the marginal sea.

A timely appeal was filed with the Department of the Interior as to each of Petitioners' applications from the Director's decision rejecting such application. (R. Jt. App. 6, 30)

By several decisions, dated July 30, 1948, and subsequently thereto, Mastin G. White, Solicitor of the De-

partment of the Interior, affirmed the respective Director's decisions above referred to. Each of these decisions of Mastin G. White was a simple statement of affirmance, with a reference to the Secretary of the Interior's decision of October 6, 1947, (A-20806) in the case of *L. B. Beer, et al.,* (R. Jt. App. 21-25)

When the matter was brought before the District Court, as a matter of law as aforesaid, that court concluded (R. Jt. App. 56) that:

> "The Mineral Leasing Act * * * does not apply to lands underlying the marginal sea off the coast of California and did not so apply at the times when the plaintiffs (Petitioners) made their respective applications thereunder."

Upon appeal, the Court of Appeals affirmed the District Court decision. (R. 58; App. "A," *infra.*)

Petitioners contend that the Secretary of the Interior interpreted and applied the Mineral Leasing Act in a way contrary to its explicit terms and that his decisions rejecting Petitioners' applications, and the decisions of the courts below upholding the Secretary's interpretation and application of the Mineral Leasing Act, were and are erroneous and contrary to law. The language of the Mineral Leasing Act is inclusive and applies to specified mineral deposits and lands containing such deposits "owned by the United States" except for specifically enumerated exclusions. The lands in the marginal sea have been held to be the property of the United States. The Act contains no restriction limiting its application to "public lands", but even if it were so restricted, as the courts below held that Congress meant to say, notwithstanding the fact that Congress had not so said, lands in the mar-

ginal sea have by this Court been held to be "public lands" belonging to the United States.

Petitioners did not ask the courts below to assume any administrative functions as to Petitioners' applications or to order the issuance of any lease pursuant to any such application. Petitioners, rather, asked the courts below to determine that the Mineral Leasing Act applied to and covered the leasing of submerged lands in the marginal sea off the coast of California and that the Secretary of the Interior be directed to reinstate or cause to be reinstated each of Petitioners' applications and to consider or cause to be considered each said application on its merits under said Mineral Leasing Act. (R. Jt. App. 8-9) Petitioners have made it clear that they did not seek and that they recognized that they could not obtain any rights as to any lands under navigable inland waters, or as to any tidelands (as distinguished from submerged lands in the marginal sea) or as to any lands within the known structure of a productive oil or gas field at the time of the filing of any lease application.

REASONS FOR GRANTING THE WRIT

The question of whether or not the Mineral Leasing Act of 1920 applies to submerged lands in the marginal sea is an important question of Federal law which has not been but which, for the reasons hereinafter stated, should be decided by this Court. The decisions of the courts below are the first and only judicial decisions on this question.

The Secretary of the Interior interpreted and applied the statute in a way contrary to its explicit terms. The courts below, in upholding the Secretary's actions,

decided this Federal question in a way and on premises in conflict with applicable decisions of this Court.

Determination of the premises upon which the Court of Appeals rendered its decision (R. 58; App. "A," *infra.*) requires reference to the decision of the District Court (R. Jt. App. 40) for the reason that the Court of Appeals, in its brief decision, in effect adopted the opinion of the District Court, stating:

> "We think its reasoning was sound and we need not repeat it here." (R. 59; App. "A," *infra.*)

The Mineral Leasing Act by its explicit terms provided:

> " * * * That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, * * * shall be subject to disposition in the form and manner provided by this Act * * *."

The District Court, relying largely upon the use of the words "public domain" in the title of the Mineral Leasing Act, construed the words "public domain" as equivalent to "public lands" and declared:

> "Since Congress intended that this Act should apply only to public lands, the critical question in this case is whether marginal sea lands are public lands." (R. Jt. App. 48)

The District Court, in holding that submerged lands in the marginal sea were not public lands, made no reference to the decision of this Court in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86. That case involved *Public Land Order 128*, 8 F.R. 8557, whereunder the Secretary of the Interior had reserved certain lands and adjacent coastal waters along the coast of Alaska.

This Court reversed a contrary holding of the Court of Appeals of the Ninth Circuit (165 F. 2d 323) and held that the submerged lands in the marginal sea off the coast of Alaska were public lands subject to withdrawal under the Acts of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141 and May 1, 1936, 49 Stat. 1250, 48 U.S.C. 358a, each of which Acts was by its express terms applicable only to "public lands." In so doing, this Court specifically pointed out the inapplicability of the "tidelands" cases to lands in the marginal sea. Those same "tidelands cases" were, in the case at bar, relied upon by the District Court and, through adoption of the District Court reasoning, by the Court of Appeals for the contrary conclusion that submerged lands in the marginal sea were not public lands.

The Court of Appeals, in its decision below, undertook to brush aside this Court's decision in *Hynes* v. *Grimes Packing Co.* (*supra*) with the statement that this Court's "conclusion rested upon 'the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory'." The Act of May 1, 1936 which was involved in the *Hynes* case imposed upon the thereby granted withdrawal authority two restrictions—first, that lands to be withdrawn be "public lands," and second, that such public lands be "actually occupied by Indians or Eskimos." This Court's conclusion in the *Hynes* case that marginal sea lands were public lands owned by the United States did not depend upon the "history and habits of Alaska natives" as the Court of Appeals said. The reference by this Court to the "history and habits of Alaska natives" was made to point out that the second and superimposed requirement of occupancy had been satisfied.

The District Court, in support of its opinion (adopted as aforesaid by the Court of Appeals) that the "marginal sea lands have not been and cannot now be regarded as public lands of the United States", not only relied upon the "tidelands" cases which, as above mentioned, this Court, in the *Hynes* case, held to be inapplicable to lands in the marginal sea, but also upon the further premise that lands in the marginal sea were not public lands because "there had been no holding of ownership by the United States."

This "no holding of ownership" premise relied upon by the courts below is in direct conflict with decisions of this Court. In *United States* v. *Texas*, 339 U.S. 707 at pp. 717-18, this Court said:

> "Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea *but ownership of it, of the land underlying it, and of all the riches which it held.* In other words, we assume that it then had the *dominion* and *imperium* in and over this belt which the United States now claims."
>
> * * *
>
> "We *hold* that as an incident to the transfer of that sovereignty *any claim* that Texas may have had to the marginal sea *was relinquished to the* United States." (Emphasis supplied.)

In *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 at p. 111 this Court said:

> "The *title* to the uplands and waters in question is in the United States." (Emphasis supplied.)

In *Alabama* v. *Texas, et al.* and *Rhode Island, et al.* v. *Louisiana, et al.*, 347 U.S. 272, there was presented to this Court the question of the validity of the Sub-

merged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, wherein Congress in Section 3(a) declared it to be

> "* * * in the public interest that (1) *title* to and *ownership* of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters * * * be, and they *are*, * * * *vested* in and *assigned* to the respective States * * * ." (Emphasis supplied.)

In upholding the conveyance to the States (347 U.S. 272 at pp. 273-274), this Court said:

> "Article IV, § 3, Cl. 2, United States Constitution. United States v. Gratiot, 14 Pet. 526, 537, 10 L. Ed. 573: *The power of Congress to dispose of any kind of property belonging to the United States* 'is vested in Congress without limitation.' United States v. Midwest Oil Co. 236 U.S. 459, 474, 35 S. Ct. 309, 313, 59 L. Ed. 673: 'For it must be borne in mind that Congress not only has a legislative power over the *public domain*, but *it* also *exercises the powers of the proprietor therein*. Congress "may deal with *such lands* precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale." Camfield v. United States, 167 U.S. (518) 524, 17 S. Ct. 864, 42 L. Ed. 260; Light v. United States, 220 U.S. 523, 536, 31 S. Ct. 485, 55 L. Ed. (570) 574.' United States v. City and County of San Francisco, 310 U.S. 16, 29-30, 60 S. Ct. 749, 756, 84 L. Ed. 1050: 'Article 4 Section 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The power over the *public land* thus entrusted to Congress is without limitations.' " (Emphasis supplied.)

As hereinabove pointed out, the rationale of the Court of Appeals' decision must be found in the "memorandum opinion" (R. Jt. App. 40, 123 F. Supp. 560) of the District Court, of which the Court of Appeals said:

> "We think its reasoning is sound and we need not repeat it here." (App. "A", *infra;* R. 59.)

The reasoning of the District Court decision is this:

> " * * * the court has concluded that the (Mineral Leasing) Act was intended to apply, and does apply, only to public lands * * *." (R. Jt. App. 48);
>
> "Since Congress intended that this Act should apply only to public lands, the critical question in this case is whether marginal sea lands are public lands." (R. Jt. App. 48);
>
> " * * * the marginal sea lands have not been and cannot now be regarded as public lands of the United States." (R. Jt. App. 51);
>
> "The court concludes, therefore, that the marginal sea lands are not public lands of the United States, and that they are not subject to lease under the Mineral Leasing Act which is limited in its applicability to public lands of the United States." (R. Jt. App. 54).

Apart from the controverted question of the correct "interpretation" which attributes an unexpressed "public lands" limitation to the clear statutory language of mineral "deposits * * * and lands containing such deposits owned by the United States", the decisions of the courts below rest upon "the critical question" of whether marginal sea lands are public lands.

Petitioners submit that the conclusions of the courts below on that "critical question" are, as above shown, in clear conflict with the decisions of this court in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, and *Alabama* v. *Texas et al.*, 347 U.S. 272.

This case alone will determine the rights of forty Petitioners under fifty applications, filed under the Mineral Leasing Act, covering thousands of acres as to which the lease rights are worth millions of dollars. Important property rights are involved. This importance of the issues is not, however, restricted to Petitioners. Numerous other applications involved in nine other cases pending before the District Court of the District of Columbia depend upon the outcome of this case.

Congress itself recognized the importance of such rights as Petitioners and other applicants might have and, in enacting the Submerged Lands Act of May 22, 1953, c. 65, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, expressly provided for the protection of such rights in Section 8 (43, U.S.C. 1315) thereof as follows:

> "Nothing contained in this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: * * *"

In recognition of the object and effect of this quoted language of said Section 8, the District Court, in its opinion below (R. Jt. App. 52), stated:

> "Thus such rights, if any, as the Plaintiffs (Petitioners) may have acquired have not been

impaired in any way although the submerged lands upon which the lease applications have been filed are no longer under the jurisdiction of the United States."

The Mineral Leasing Act of 1920 represented and still represents the most important enactment relating to this nation's mineral resources since the enactment of the General Mining Laws of 1872 (c. 152, 17 Stat. 91). The Mineral Leasing Act was enacted to meet a dire need for the minerals referred to in the Act. The Act permitted development and production of the specified minerals from deposits and lands which were closed to exploration and development under the then existing laws. The use by Congress of the Act's broad language of applicability to mineral "deposits * * * and lands containing such deposits owned by the United States" with only particularly stated exclusions, none of which are applicable in the case at bar, cannot be considered unintended in the light of the objectives of the legislation. Those objectives are found clearly expressed in the hearings and reports relating to the legislation. Illustrative of references made in these reports to the objectives of the Act is the statement found in Senate Report 116, 65th Cong. 1st Sess., as to S. 2812 (one of the forerunners of the Mineral Leasing Act):

> "This is an emergency measure * * * .
>
> "Never before in the history of the country, and we hope, never again, will there be such a vital necessity for a sudden and *enormous* supply of both oil and gasoline. *It will require the development to the maximum of every known supply of oil* to carry out our war program with relation to our Navy, motor vehicles, and flying machines.

"We must get oil now *wherever we can get it* and as fast as we can get it * * * .

"We respectfully urge most careful attention to some of the statements made by Mr. Doheny at the hearings upon the bill under consideration. Mr. Doheny said:

> ' * * * when asked by Mr. Baruch what regions I thought should be thrown open for development, *I answered that I thought any place, no matter to whom it belonged, whether to a private individual, a corporation, or the Government, that would produce oil in the greatest quantity with respect both to the amount of time and money invested.'*

"There should be no question in the mind of any Senator as to the necessity of this legislation." (Emphasis added.)

That the Interior Department considered the Mineral Leasing Act to apply to submerged lands in the marginal sea, if they were held to be the property of the United States, is indicated by its action with respect to Petitioners' applications. Action on Petitioners' applications, including the eleven filed in 1938 and the two in 1939, was held suspended until after this Court's decision of June 23, 1947, in *United States* v. *California,* 332 U.S. 19. That the deferring of action upon said applications was based upon the pendency of "litigation between the United States and the State of California with respect to such submerged lands adjacent to the State-owned tidelands along its shores" is conceded in the decision of the Director of the Bureau of Land Management (R. Jt. App. 11-12) rejecting such applications. Obviously, if the Department of the Interior had considered the Mineral Leasing Act inapplicable regardless of the out-

come of that litigation, the litigation would have been no reason for withholding action upon the applications.

After the announcement of this Court's decision in the *California* case, there developed great pressure to nullify the results of this Court's holding that the State of California had no title to submerged lands in the marginal sea off its coast. This pressure came from the affected coastal states and from lessees of those states. State lessees had gone upon lands involved in the case at bar under invalid state leases during the period the Interior Department was awaiting decision on the question of state title and accordingly was withholding action upon the applications which Petitioners and others had filed under the Mineral Leasing Act. Petitioners' applications and the other similar applications so held suspended *while* the *California* case was pending were rejected *after* this Court rendered its decision in that case. The granting of those applications would have adversely affected the efforts of affected coastal states and their lessees to acquire the rights which they had erroneously asserted.

Important principles are involved in this case. Ever important to the public is the question of the interpretation and application of acts of Congress. It is a matter of national concern whenever, through "interpretation" of a statute, there is departure from the "plain and explicit" language of the statute. The inherent dangers of permitting such departure are aptly pointed out in *Wilbur* v. *Krushnic*, 280 U.S. 318-19, which quotes from *Roberts, Treasurer* v. *United States*, 176 U.S. 221, 231.

If administrative or court "interpretation" can write into the Mineral Leasing Act a "public lands" limitation to restrict the Act's express applicability to "deposits * * * and lands * * * owned by the United States", the way is opened for other "interpretations" upon other occasions to be added in restriction of the Act's applicability.

If, despite this Court's holdings that submerged lands in the marginal sea are public lands of the United States, the courts below may base conclusions and deny property rights upon the contrary premise, the way is opened for other courts in other cases to base conclusions on premises contrary to decisions of this Court.

Property rights as well as civil liberties are objects of protection in the framework of our constitutional system. Property rights of many persons and of great value depend directly upon the outcome of this case. Property rights of many more will indirectly depend thereon.

There are circumstances which distinguish this case from most cases which involve statutory construction or interpretation—circumstances which, Petitioners submit, warrant review of the decision of the Court of Appeals:

1. The language of the Mineral Leasing Act declaring its applicability to the enumerated "deposits * * * and lands containing such deposits owned by the United States" is clear and unambiguous;

2. The Act expressly sets forth specific exclusions from the above mentioned clear inclusive provision;

3. The inclusive language includes, and the specific exclusions do not exclude, submerged lands in the marginal sea;

4. The initial major premise of the courts below that the Mineral Leasing Act applies only to public lands represents a limitation which the courts below supplied by "construction" since it is not to be found in the Act.

5. The ultimate conclusion of the courts below cannot flow from that initial major premise alone. It depends upon the second and superimposed premise that submerged lands in the marginal sea are not public lands.

6. That second premise is contrary to the decisions of this Court.

7. Incident to that second premise of the courts below was the included minor premise that marginal sea lands are not public lands *because* they have not been held to be owned by the United States.

8. That included minor premise is contrary to the decisions of this Court.

The decisions of the courts below are the first and only judicial decisions on the ultimate question in this case. The courts below decided that question as to the interpretation and application of the Federal Mineral Leasing Act on premises in conflict with applicable decisions of this Court. This case involves important principles and the valuable property rights of the forty Petitioners and the valuable property rights of others. The question presented, the conflicts with this Court's decisions, the principles involved and

the importance of the property rights render this a case of public importance.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12561

CLARENCE I. JUSTHEIM, ET AL., APPELLANTS

v.

DOUGLAS McKAY, Secretary of the Interior, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided January 5, 1956

Mr. Clair M. Senior, of the bar of the Supreme Court of Utah, *pro hac vice*, by special leave of Court, with whom *Mr. Melville Ehrlich* was on the brief, for appellants.

Mr. George S. Swarth, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Mr. Roger P. Marquis* was on the brief, for appellee Douglas McKay.

Mr. William W. Clary, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Messrs. Albert Noble McCartney* and *Hugh Fullerton* were on the brief, for appellees Signal Oil and Gas Company and Southwest Exploration Company.

Before PRETTYMAN, WILBUR K. MILLER, and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Between 1938 and 1947 our appellants, or persons through whom they claim, filed with the Secretary of the Interior separate applications under

the Mineral Lands Leasing Act of 1920[1] for oil and gas leases of submerged lands off the coast of California. These lands are located below the line of mean low tide and within the three-mile limit. In 1948 appellants' applications were denied, on the ground that the lands in question were not subject to disposition under the Mineral Lands Leasing Act. Appellants then brought this suit against the Secretary, seeking an adjudication that the Act applied to lands under the marginal seas. Additional parties were allowed to intervene as defendants. The District Court concluded that the Mineral Lands Leasing Act applied only to public lands and that public lands do not include lands beneath the marginal seas. Judgment was entered for the defendants. This appeal followed.

In support of its conclusion the District Court rendered a memorandum opinion.[2] We think its reasoning was sound and we need not repeat it here. Appellants, however, say the court failed to give effect to several decisions of the Supreme Court. We consider this contention briefly.

Appellants first cite *Hynes* v. *Grimes Packing Co.*[3] There the Secretary of the Interior had been authorized to designate as Indian reservations in Alaska "any • • • public lands which are actually occupied by Indians or Eskimos within said Territory".[4] The argument was made that this

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[1] 41 STAT. 437, as amended, 30 U.S.C.A. § 181 *et seq.*, Sec. 1 of which Act provided in pertinent part: "That deposits of • • • oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, • • • shall be subject to disposition in the form and manner provided by this Act • • •."

[2] Justheim v. McKay, 123 F. Supp. 560 (D.C. D.C. 1954).

[3] 337 U.S. 86, 93 L.Ed. 1231, 69 S.Ct. 968 (1949).

[4] 49 STAT. 1250 (1936), 48 U.S.C.A. § 358a.

authorization did not extend to certain fisheries beyond the line of mean low tide. The Supreme Court rejected the contention. It made clear, however, that the conclusion rested upon "the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory."[5] The Court was not dealing generally with lands located beneath the marginal seas; it was dealing with particular lands and with the necessity of fitting the statute before it into an "existing system" of custom and administration. Its decision lends no support to appellants' proposition that all lands under the marginal seas are public lands subject generally to disposal under the Mineral Lands Leasing Act.

Appellants also rely upon *Alabama* v. *Texas* and *Rhode Island* v. *Louisiana*.[6] These were companion cases in which the Supreme Court denied leave to file complaints challenging the power of Congress to quitclaim to certain states the interest of the United States in lands under the marginal seas.[7] In a short *Per Curiam* opinion the Court spoke of the power of Congress to dispose of "public lands" and

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[5] Hynes v. Grimes Packing Co., *supra*, 337 U.S. at 110-111. In its opinion the Court specifically rejected a statutory interpretation arrived at "by extracting • • • a single phrase, such as 'public lands,' and getting the phrase's meaning from the dictionary or even from dissimilar statutes." It emphasized the necessity of reading the statute as a whole and in context. *Id.* at 116. We think this admonition equally applicable here. Appellants contend that the words of the Mineral Lands Leasing Act, "lands • • • owned by the United States," should be given their dictionary meaning. The District Court, however, considered the history of the subject, the statute as a whole and the difficulties in administration posed by appellants' interpretation. It properly concluded that the intent of the Congress was better revealed by the whole than by an isolated part.

[6] 347 U.S. 272, 98 L.Ed. 689, 74 S.Ct. 481 (1954).

[7] By the terms of the Submerged Lands Act of 1953, 67 STAT. 29, 43 U.S.C.A. § 1301 *et seq.*

lands within the "public domain". But the Court was dealing with the power of Congress to dispose of those lands by special enactment. It decided only that Congress exercised proprietary rights over lands beneath the marginal seas and that those rights could be relinquished. The term "public lands" was thus used generally to designate lands subject to disposal as property of the United States.[8] It by no means follows that lands so designated are also subject to disposal under general laws such as the Mineral Lands Leasing Act. In the case at bar the District Court recognized and relied upon the distinction. It held, after careful consideration, that Congress did not intend to apply the Mineral Lands Leasing Act to lands under the marginal seas where problems of survey and administration would be wholly different from those contemplated in the statute. We think this conclusion is consistent with the Supreme Court decisions cited by appellants. The judgment of the District Court will therefore be

Affirmed.

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[8] See Hynes v. Grimes Packing Co., *supra*, 337 U. S. at 114 n. 39.

Filed Jan. 5, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956.

No. 12,561

CLARENCE I. JUSTHEIM, ET AL., *Appellants*,

v.

DOUGLAS MCKAY, Secretary of the Interior, et al., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellees, except appellee Douglas McKay, Secretary of the Interior, recover from appellants their taxable costs on this appeal and have execution therefor.

Dated: January 5, 1956.

PER CIRCUIT JUDGE PRETTYMAN.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 813

CLARENCE I. JUSTHEIM, ET AL., PETITIONERS

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT DOUGLAS McKAY, SECRETARY OF THE INTERIOR, IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. "A", pp. 1a–4a) is reported at 229 F. 2d 29. The opinion of the district court (R. 40–54)[1] is reported at 123 F. Supp. 560.

JURISDICTION

The judgment of the court of appeals (Pet. App. "A", p. 5a) was entered on January 5, 1956. The petition for writ of certiorari was filed on March 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] Reference is to the record consisting of the joint appendix in the court below and the accompanying documents.

STATUTE INVOLVED

The Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. 181, reads in pertinent part:

> An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.
>
> *Be it enacted* * * * That deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act * * *.

QUESTION PRESENTED

Whether the Mineral Leasing Act of 1920, as amended, was applicable to submerged lands of the marginal sea prior to their transfer to the States by the Submerged Lands Act.

STATEMENT

At various times from April 1, 1938, through August 11, 1947, petitioners or their predecessors in interest severally applied to the Secretary of the Interior, under the Mineral Leasing Act of 1920, for oil and gas leases [2] of submerged lands off the coast of California (R. 4, 10, 30, 54–55). The applications were rejected by the Interior

[2] Some of the applications were for prospecting permits (R. 4, 30), but are now to be treated as applications for leases. 49 Stat. 675–676.

Department in August 1948, action having been withheld pending the decision in *United States* v. *California*, 332 U. S. 19. The basis of decision as to that part of the land which underlay the marginal sea was that it was not within the scope of the Mineral Leasing Act (R. 6–7, 11, 19, 55). Petitioners then brought this suit against the Secretary of the Interior for a declaratory judgment that the Mineral Leasing Act did apply to the area in question and to require him to entertain their applications on their merits (R. 1, 8–9, 55). The Signal Oil and Gas Company and the Southwest Exploration Company, lessees from the State of California of part of the area involved, were allowed to intervene as defendants (R. 39–40).

By the Submerged Lands Act of May 22, 1953, the United States granted to coastal States and their lessees the submerged lands of the marginal sea within their boundaries (67 Stat. 29, 43 U. S. C. (1952 ed.) Supp. II, 1301–1315), and by the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462, 43 U. S. C. (1952 ed.) Supp. II, 1331–1343) Congress made exclusive provision for mineral leasing of the remaining offshore area; but both acts preserved rights, if any, previously acquired under any laws of the United States.

Judgment denying relief was entered by the district court on October 29, 1954 (R. 57), and was affirmed by the court of appeals on January 5, 1956 (Pet. App. "A," p. 5a; 229 F. 2d 29).

ARGUMENT

1. Petitioners' basic contention is that the language of the Mineral Leasing Act, making it applicable to "deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States," is broad enough to include the submerged lands and minerals of the marginal sea, and must be given effect accordingly (Pet. 7, 13, 16). However, the rule has long been settled that land laws that refer in general terms to "land" do not include land under navigable water. Navigable water areas are held not for disposal but for the public and subject to the public right of navigation. They are commonly considered water rather than land, and must be specifically designated in a land law before they will be held to be within its scope. *Illinois Central Railroad* v. *Chicago*, 176 U. S. 646, 660; *Morris* v. *United States*, 174 U. S. 196, 234–235.[3] This is true of laws relating to mineral rights alone,

[3] State decisions are to the same effect. *Illinois Central R. R. Co.* v. *City of Chicago*, 173 Ill. 471, 483 (1898), affirmed, 176 U. S. 646; *Matter of City of New York (Schurz Ave.)*, 278 App. Div. 309, 310 (N. Y., 1951); *Tatum* v. *Sawyer*, 9 N. C. 226, 229 (1822); *Resort Development Co.* v. *Parmele*, 235 N. C. 689, 697 (1952); *State* v. *Pacific Guano Co.*, 22 S. C. 50, 84 (1884); *Goodwin* v. *Thompson*, 83 Tenn. 209, 215 (1885); *Cunningham* v. *Prevow*, 28 Tenn. App. 643, 651 (1945); *State of Texas* v. *Bradford*, 121 Tex. 515, 530, 543 (1932); *James River & K. P'r Co.* v. *Old Dominion Corp.*, 138 Va. 461, 471–472 (1924); *Baer* v. *Moran Brothers Co.*, 2 Wash. 608, 612–613 (1891).

as well as to laws for the disposal of fee titles. *Landry* v. *Robison,* 110 Tex. 295, 298 (1920). Since the Mineral Leasing Act does not mention land under navigable water, it must be presumed to be inapplicable thereto.

Substantive provisions of the Act reinforce this view. Section 13[4] contained detailed requirements for erecting "a monument not less than four feet high, at some conspicuous place" on the land, posting a notice on or near the monument, describing the land "by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land," and marking the corners "so that the boundaries can be readily traced on the ground." 41 Stat. 441; 49 Stat. 674. Clearly, Congress did not expect this act to be applied to the bed of the sea.

2. The Mineral Leasing Act should be construed to apply only to the public lands or public domain, terms which do not include land under navigable water. The use of the phrase, "lands owned by the United States," was not an innovation in the Mineral Leasing Act. Similar language had been used in the federal mining law ever since the Act of May 10, 1872, 17 Stat. 91, R. S. § 2319, where it was held to apply only

[4] This section, formerly codified as 30 U. S. C. 221, is now omitted from the Code as having expired by its own terms. Its provisions were indicative of the intention of Congress when the Act was passed.

to the public lands. *Oklahoma* v. *Texas,* 258 U. S. 574, 599–600. The same language, carried forward on the same subject into the Mineral Leasing Act, should be given the same construction. This view is supported by the facts that the act was entitled, "An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (41 Stat. 437), and that when it was before Congress it was repeatedly referred to in the debates and committee report as dealing with the public lands or public domain. *E. g.,* H. Rept. No. 398, 66th Cong., 1st sess., 11–13, 18.[5]

The submerged lands of the marginal sea are not "public lands" or "public domain." Those are synonymous terms that refer only to lands held subject to sale or other disposal under general laws. *Barker* v. *Harvey,* 181 U. S. 481, 490. They do not include land under navigable water, which is held primarily not for disposal but for the public and subject to the public right of navigation. *State ex rel. Town of Crescent City* v. *Holland,* 151 Fla. 806, 838 (1942); *Northern Pacific Ry. Co.* v. *Hirzel,* 29 Idaho 438, 456 (1916);

[5] Attorneys General Stone and Jackson both ruled that the Mineral Leasing Act applied only to public lands. 34 Op. A. G. 171; 40 Op. A. G. 9. Attorney General Clark ruled that it did not apply to the submerged lands of the marginal sea. 40 Op. A. G. 540.

City of Galveston v. *Mann*, 135 Tex. 319, 330 (1940).*

3. Petitioners argue (Pet. 7–12) that this Court has held in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, and in *Alabama* v. *Texas*, 347 U. S. 272, that the bed of the marginal sea is "public land." That contention is not sound. The *Hymes* case involved a withdrawal of land, including an area in the marginal sea, as an Alaskan Indian reservation, under the Pickett Act of 1910, 36 Stat. 847, and the Act of May 1, 1936, 49 Stat. 1250. Those acts both authorized withdrawals of "public lands," but whereas the Pickett Act was available anywhere and for any public purpose, the 1936 Act applied only to Alaskan Indian reservations. This Court said that the validity of the withdrawal of the offshore area "depends in this case on the scope of the power granted to the Secretary to establish this reservation by the language of § 2 of the Act of May 1, 1936" (337 U. S. at 101). Considering the particular purpose of the 1936 act, the well-known dependence of the Alaskan Indians on fishing, the previous history of Alas-

* Decisions of this Court are to the same effect. However, they have also rested upon another ground of decision not present in the case of the marginal sea, namely, that land under other navigable water within the Territories of the United States is held by the Federal Government in trust for the future States. *E. g.*, *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 283–284; *Shively* v. *Bowlby*, 152 U. S. 1, 49–50, 58.

kan Indian reservations, and the fact that the act authorized only a withdrawal and not a disposal of land, the Court concluded that Congress intended by the 1936 Act to authorize withdrawals of offshore areas. In thus relying on those special circumstances, and in holding that the validity of the offshore reservation depended wholly on the effect of the 1936 Act, the Court clearly indicated that the marginal sea bed was not "public land" in the ordinary sense of the term or within the scope of the Pickett Act.

Alabama v. *Texas*, 347 U. S. 272, sustaining the constitutionality of the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. (1952 ed.) Supp. II, 1301–1315, quoted earlier decisions declaring the plenary power of Congress to dispose of property of the United States. Some of those quotations referred to public lands; but it is apparent that the Court's purpose was only to indicate the broad sweep of the Congressional power, not to categorize the submerged lands of the marginal sea.

4. There has been no conflict between courts on the question, and none seems likely to arise. The question has no continuing importance. The submerged lands within State boundaries were granted to the coastal States by the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U. S. C. (1952 ed.) Supp. II, 1301–1315; those beyond State boundaries can now be leased only under the Outer Continental Shelf Lands Act of

August 7, 1953, 67 Stat. 462, 43 U. S. C. (1952 ed.) Supp. II, 1331–1343. Both acts preserve rights, if any, previously acquired under federal laws; but no new offshore claims can be asserted under the Mineral Leasing Act beyond those already filed.

CONCLUSION

The decision of the court below is clearly correct. Further review is not warranted, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1956.

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IN THE

Supreme Court of the United States

October Term, 1955
No. 813.

CLARENCE I. JUSTHEIM, *et al.*,

Petitioners,

vs.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, SIGNAL OIL AND GAS COMPANY, and SOUTHWEST EXPLORATION COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief for Respondents Signal Oil and Gas Company and Southwest Exploration Company, in Opposition.

Opinions Below.

The opinion of the District Court for the District of Columbia is reported at 123 F. Supp. 560 (Jt. App. pp. 40-54).* The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 229 F. 2d 29 (Pet. App. "A", pp. 1a-4a).

Jurisdiction.

The judgment of the Court of Appeals (Pet. App. "A", p. 5a) was entered on January 5, 1956. The petition for writ of certiorari was filed on March 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

*References throughout this brief to the Joint Appendix are to the Joint Appendix attached to the brief of appellants (petitioners here) in the United States Court of Appeals for the District of Columbia Circuit.

Statute Involved.

The pertinent portions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 30 U. S. C. Sec. 181, are set forth in Appendix A to this brief.

Question Presented.

Was the Court below correct in holding that the Mineral Leasing Act of 1920 was not applicable to the submerged lands of the marginal sea prior to the transfer of such lands to the coastal States by the Submerged Lands Act of 1953.

Statement.

This litigation involves an attempt to obtain a judicial declaration that the Mineral Leasing Act of 1920 was applicable to the submerged offshore lands of the marginal sea* prior to the passage of the Submerged Lands Act of 1953. Between April 1, 1938 and August 10, 1947 petitioners filed 50 applications for oil and gas leases under the provisions of the Mineral Leasing Act (Jt. App. pp. 54-55). Each of these applications covers submerged lands lying off the shore of California, but most of the applications are in areas where the boundary of the marginal sea is in dispute in the proceeding now pending before this Court in *United States v. California*, No. 6

*The marginal sea involved here is a three mile belt of ocean water within the boundaries of California which extends seaward from low water mark or from the seaward limit of inland waters such as bays, harbors and channels. See *United States v. California*, 332 U. S. 19, 22, 25-26.

Original (Jt. App. pp. 30, 55). However, two of the applications (Serial Nos. Sacramento 038077 and 038079) cover lands underlying the waters of the marginal sea in an area where the boundary of the marginal sea is not in question in that proceeding (Jt. App. p. 55).

Petitioners' applications were rejected by the Director of the Bureau of Land Management, Department of Interior, who held that (a) to the extent that the lands for which leases were sought underlay the inland waters of California, the United States had neither title nor power to lease and (b) in those cases where the lands for which leases were sought underlay the marginal sea, the Mineral Leasing Act did not apply (Jt. App. pp. 11, 55). The Director's decision was based upon an opinion of the Solicitor of the Department of the Interior of August 8, 1947 (60 I. D. 26) holding that the Mineral Leasing Act does not apply to the submerged offshore lands, and upon an opinion of the Attorney General of August 29, 1947 (40 Ops. Atty. Gen. 540) confirming the Solicitor's opinion. The Director's decisions were affirmed by the Secretary of the Interior or under his authority (Jt. App. p. 55).

On September 30, 1949 petitioners brought this action in the District Court for the District of Columbia asking for (1) a declaratory judgment that the Mineral Leasing Act applies to lands underlying the marginal sea off the coast of California, and (2) an order directing the Secretary of the Interior to reinstate and reconsider their applications under the Act (Jt. App. pp. 1-9). The District Court permitted respondents Signal Oil and Gas

Company and Southwest Exploration Company to intervene as parties defendant in this action (Jt. App. pp. 31-40). These respondents are producing oil companies operating under leases from the State of California which include lands applied for by some of the petitioners (*Ibid.*).

The submerged lands of the marginal belt were vested in the coastal states by the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U. S. C., Supp. II, Secs. 1301-1315. Shortly thereafter, in the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 43 U. S. C., Supp. II, Secs. 1331-1343, Congress established special and exclusive provisions for the leasing of the vast offshore area seaward of the marginal belt. Both of these Acts preserved rights, if any, previously acquired under any laws of the United States.

The District Court, McLaughlin, J., ruled that the Mineral Leasing Act did not apply to the submerged offshore lands of the marginal sea and, accordingly, on October 29, 1954 it entered judgment against the plaintiffs and ordered the complaint dismissed. In its memorandum, the District Court held, first, that the Mineral Leasing Act applies only to public lands or to those mineral deposits which were reserved when the surface public land was patented, and that the marginal sea lands have not been and cannot now be regarded as public lands. In so holding, the Court emphasized that it was the prevailing belief at the time of the passage of the Mineral Leasing Act that the states held title to the submerged offshore lands and that the decision in *United States v. California*, 332

U. S. 19 did not hold that the United States "owned" the marginal sea lands in the sense required to make such lands "public lands" of the United States. Second, the District Court held that "it is impossible to reconcile" the Act's requirements as to "survey, erection of monuments upon the land and the outlining of the boundaries of the tract upon the ground with a legislative intention to include the submerged lands in question within the scope of the Act" (Jt. App. p. 53). Finally, the District Court found support for its conclusion in the fact that Congress has several times extended the applicability of the Mineral Leasing Act but has never taken action to include submerged offshore lands, and indeed explicitly excluded them on the only occasion on which they were mentioned, namely, the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 913, 30 U. S. C. Sec. 351.

The Court of Appeals affirmed on January 5, 1956 in a unanimous decision by Judges Prettyman, Miller and Bastian. Referring to the District Court's memorandum opinion, the Court of Appeals said, "We think its reasoning was sound and we need not repeat it here" (Pet. App. "A", P. 2a). The Court of Appeals did discuss and distinguish *Hynes v. Grimes Packing Co.*, 337 U. S. 86, and *Alabama v. Texas* and *Rhode Island v. Louisiana*, 347 U. S. 272, and it found these cases fully consistent with the District Court's decision.

ARGUMENT.

I.

There Is No Important Question of Federal Law Involved.

The question presented here can have no public importance in the future. The passage by Congress in 1953 of two major statutes relating to the submerged offshore lands eliminated any possibility that the Mineral Leasing Act of 1920 will control the future development of those lands. In the Submerged Lands Act, 67 Stat. 29, 43 U. S. C., Supp. II, Secs. 1301-1315, Congress granted to each of the coastal States the submerged lands within three miles of its coastline or within its historic boundary.* In the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C., Supp. II, Secs. 1331-1343, Congress established special and exclusive provisions for the leasing by the federal government of the mineral resources of the vast offshore area seaward of state boundaries. Taken together, these two statutes establish a comprehensive and exclusive scheme for the administration of offshore areas and for the development of their resources.

Since this congressional action drains any possible prospective significance from the decision below, this case falls within the category of cases in which certiorari is denied or apparently is denied because the issue presented is no longer a live one. *District of Columbia v. Sweeney*, 310 U. S. 631 ("Petition for writ of certiorari . . . denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance"); *United States v. Abrams*,

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*Challenges to the constitutionality of this Act were rejected in *Alabama v. Texas* and *Rhode Island v. Louisiana*, 347 U. S. 272.

344 U. S. 855 (question presented whether Renegotiation Board had power under the Renegotiation Act of 1943 to fix at six per cent the interest payable to the Government on excess profits, but the Renegotiation Act of 1951 had established a four per cent interest rate and question related only to profits made before 1946); *Community Services, Inc. v. United States,* 342 U. S. 932 (question presented whether corporation was exempt from employment taxes because its profits were paid to exempt charitable or educational organizations, but statutory changes made this question academic as to tax years after 1950); *United States v. Beal,* 340 U. S. 852 (questions presented whether civilian fire fighters employed at an army installation were entitled to time and a half for overtime under overtime pay statutes and could sue for it in the federal district court, but pertinent statutes and regulations had expired); *Commissioner v. Basalt Rock Co.,* 339 U. S. 966 (question presented with respect to method of computation of income for purposes of excess profits tax, but problem could no longer arise because controlling statutory provisions had been changed); *cf. Rice v. Sioux City Cemetery,* 349 U. S. 70 (certiorari dismissed as improvidently granted where additional study of case indicated that subsequent legislation barred the ultimate question—a difficult constitutional issue—from arising again).*

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*The strength of the rule that the Court ordinarily declines to review cases if the issue is no longer live is shown by the fact that the Court denied certiorari in the *Abrams, Community Services, Beal,* and *Basalt Rock* cases even though in each case either the respondent conceded or the lower court stated that the decision sought to be reviewed was in direct conflict with a decision of another court of appeals or the Court of Claims, and in two of the cases the respondent acquiesced in the petition for certiorari. See Stern, Denial of Certiorari Despite a Conflict, (1953) 66 Harv. L. Rev. 465.

The public importance requisite for the granting of certiorari is not supplied by petitioners' assertions (p. 12) that there are forty petitioners in this case and nine other cases pending raising the same issue. The Court was not persuaded to grant certiorari in the *Abrams* case where the petition asserted that the question presented was involved in 468 unsettled Government claims for excess profits of which 200 were in litigation, or in the *Community Services* case where the respondent in acquiescing to the petition stated there were a number of pending cases presenting the issue, or in the *Beal* case where the petition asserted that from 12,000 to 15,000 civilian fire fighters might claim from 16 to 22 million dollars in similar cases. The vital factor in those cases, as in the case at bar, is that the subsequent congressional action or the expiration of the statute involved prevents the question presented from arising in the future.

Properly viewed in the context of the 1953 Acts of Congress, this litigation is important only to the parties and to a relatively small group of individuals who like Petitioners seek to use the Mineral Leasing Act to obtain leases on submerged offshore lands. Petitioners have had a full hearing on their assertedly valuable property rights, first in the Interior Department, then in the District Court and most recently in the Court of Appeals. As Chief Justice Hughes emphasized, the granting of review by this Court is not controlled by "the importance of the parties or the amount involved" but rather by "the need of securing harmony of decision and the appropriate settlement of questions of general importance." 20 A. B. A. J. 341. So measured, this case does not warrant review in this Court.

II.

There Is No Conflict of Decision.

Petitioners' claim that the decision below is in direct conflict with decisions of this Court does not withstand analysis. None of the decisions cited by petitioners impinges upon or in any way relates to the independent ground of decision of the courts below that the terms and requirements of the Mineral Leasing Act itself show that it was not the congressional purpose that the Act should be applicable to the submerged offshore lands (Jt. App. pp. 52-53). Moreover, as to the points on which they are assertedly relevant, the decisions cited by petitioners are far from being in conflict with the decision below.

The holding in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, which is relied on by Petitioners (pp. 7-9), is sharply distinguishable from the question whether marginal sea land is public land within the terms of the Mineral Leasing Act. In the *Hynes* case, this Court, as the court below correctly stated, "was not dealing generally with lands located beneath the marginal seas; it was dealing with particular lands and with the necessity of fitting the statute before it into an 'existing system' of custom and administration" (Pet. App. "A", p. 3a). This Court emphasized in the *Hynes* case that the factors which warranted the inclusion of the small strip of land below low water mark in the Indian reservation were the following: "the importance of the fisheries to the Alaska natives, the temporary character of the reservation, the Annette Islands case, the administrative determination, the purpose of Congress to assist the natives by the Alaska amendment to the Wheeler-Howard Act." 337 U. S. at 116. None of these factors is present in

the case now before the Court, and there are no similar considerations which indicate that the marginal sea lands surrounding the entire United States should be held to be public lands within the terms of the Mineral Leasing Act.

The *per curiam* opinion in *Alabama v. Texas* and *Rhode Island v. Louisiana,* 347 U. S. 272, upholding the constitutionality of the Submerged Lands Act is, contrary to petitioners' claim (pp. 9-12), fully consistent with the decision in this case. What the Court held in that decision is that under Article IV, Section 3, Clause 2 of the Constitution, Congress has unlimited power *"to dispose of any kind of property** belonging to the United States." 347 U. S. at 273. The fact that the Court quoted from cases involving public lands to illustrate the range of this unlimited power does not prove that the property before the Court was deemed to be public lands. Moreover, as the court below observed, the vindication of the power of Congress to dispose of proprietary rights in lands beneath the marginal seas by special enactment certainly does not mean that such lands are subject to disposition under general laws such as the Mining Leasing Act.

Nor is there any basis for petitioners' charge (p. 9) that the decision below is in conflict with *United States v. Texas,* 339 U. S. 707, even on the limited question whether the United States was held to have "ownership" of the marginal sea in the sense required for disposition under the Mineral Leasing Act. The Court's statement in

*Emphasis in quotations throughout this brief is added unless otherwise indicated.

the *Texas* case that "We assume that as a Republic she [Texas] had not only full sovereignty over the marginal sea but ownership of it" was clearly not a *finding* of ownership, but only an *assumption* made to show that whatever special claim Texas as a Republic might have had cannot now be recognized. Moreover, as in the *California* case, 332 U. S. 19, the Court in the *Texas* case carefully refrained from referring to the United States interest as ownership or title but rather used the phrases "paramount rights" and "paramount powers." 339 U. S. at 712, 717, 719.

III.

The Decision Below Is Clearly Correct.

The courts below, the Interior Department and the Attorney General have held without dissent that the Mineral Leasing Act does not apply to the submerged lands of the marginal belt. The arguments tendered here by petitioners have been fully considered but unanimously rejected. A brief review of the merits of petitioners' claim will show beyond doubt that the decision below is clearly correct and that it is supported by a number of valid independent grounds.

A. The Terms and Requirements of the Mineral Leasing Act Show That It Was Not the Congressional Purpose That the Act Apply to Submerged Offshore Lands.

It is clear from even the most casual reading of the Mineral Leasing Act that it does not apply to all deposits and lands "owned by the United States" and that it is necessary to look beyond those isolated words to determine whether a particular category of land is included

in the Act.* Viewing the Act as a whole, the District Court pointed out that it contained explicit provisions "requiring survey [Sec. 14], erection of monuments upon the land and the outlining of the boundaries of the tract upon the ground."** The District Court concluded that "it is impossible to reconcile the inclusion" of these requirements with a "legislative intention to include the submerged lands in question within the scope of the Act" (Jt. App. pp. 52-53). The Court of Appeals reiterated this conclusion (Pet. App. "A", p. 4a). Petitioners have completely ignored this compelling ground of decision in their petition for certiorari.

Having in mind the unique characteristics of the submerged lands underlying the marginal belt,*** it is appar-

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*The late Chief Justice Harlan F. Stone as Attorney General called attention to the obvious fact that the United States "owns" the capitol ground in Washington, the lands in National cemeteries and the parks and squares in the District of Columbia and said "no one would contend that any of these latter lands are subject to the Leasing Act." 34 Ops. Atty. Gen. 171 (1924). Similarly, the late Justice Robert H. Jackson as Attorney General held that the vast body of "acquired lands" of the United States was beyond the scope of the Act despite the fact that they are "owned by the United States" and that the Act did not specifically exclude them. 40 Ops. Atty. Gen. 9 (1941).

**Section 13 of the Act provided that "The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby." 41 Stat. 441.

***The physical conditions in the offshore lands underlying the marginal sea are strikingly different from those which exist on the upland. In some parts of the marginal belt the ocean waters are hundreds of feet deep, and the average depth is at least 50 feet. Waves produced by the action of wind on water far out in the ocean increase in height and turbulence when they reach the marginal belt where at times the surf pounds with almost unbelievable destructiveness. A stronger force even than the waves are the tides which every day carry millions of tons of water in and out of the marginal belt. See Carson, "The Sea Around Us" (1951) pp. 122-123.

ent that the boundaries of a tract cannot be "readily traced on the ground" in that area as required by the Act. Likewise, erection of monuments on the submerged offshore lands is highly impractical. Moreover, submerged offshore lands have never been surveyed and to do so would be difficult and costly to say the least. The sensible construction of the courts below obviates the strained and incongruous results which would flow from making the Act applicable to the submerged offshore lands. *Cf. Foley Bros. v. Filardo,* 336 U. S. 281.

The holding of the court below is in accord with the well settled principle that, in the absence of specific reference, lands beneath navigable waters are not included within the general terms of land disposal statutes. The Supreme Court has held, for instance, that District of Columbia statutes authorizing the sale of land do not extend to lands beneath navigable waters. *Morris v. United States,* 174 U. S. 196; see also, *District of Columbia v. Cropley,* 23 App. D. C. 232 (1904). Federal statutes providing for the disposal of lands within territories likewise do not include such submerged lands. *Shively v. Bowlby,* 152 U. S. 1. Similarly, state statutes providing for the disposition of lands have repeatedly been held not to extend to lands beneath navigable waters. *Illinois Central R.R. Co. v. City of Chicago,* 173 Ill. 471, 50 N. E. 1104 (1898), affirmed, 176 U. S. 646 (1900); *James River Co. v. Old Dominion Corp.,* 138 Va. 461, 122 S. E. 344 (1924). These decisions, like the decision of the court below, reflect the fact that statutes designed for land areas simply do not make sense with respect to lands beneath navigable waters whose nature and characteristics are so vastly different.

The basic inappropriateness of the Mineral Leasing Act for application to the submerged offshore lands is made evident by comparing and contrasting it with the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 43 U. S. C., Supp. II, Secs. 1331-1343, in which Congress established a federal leasing program to develop the mineral resources of the submerged lands lying seaward of the marginal belt. This 1953 Act abounds in provisions which recognize the special nature of the offshore areas, and indeed almost every provision of the Act has the earmarks of having been designed especially for the unique offshore operations.* Although these specially designed provisions of the 1953 Outer Continental Shelf Lands Act obviously are essential for the proper regulation of offshore operations, the Mineral Leasing Act contains not a single one of them. Thus, it is not surprising that Congress made certain that the Mineral Leasing Act would not be applicable in these waters by providing in Section 4(a)(1) that "mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this [the Outer Shelf] Act."

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*For example: Section 3(b) directs that the "Act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected." Section 4(e) authorizes Coast Guard regulations for the safety of life and property in connection with the operations for the development of minerals. Section 4(f) gives the Secretary of the Army authority to prevent obstructions to navigation in the navigable waters involved.

B. Submerged Offshore Lands Were Not Public Lands Within the Meaning of the Mineral Leasing Act.

An independent ground of the decisions below was that the Mineral Leasing Act applies only to public lands and that the submerged offshore lands were not public lands. Petitioners challenge both aspects of this holding.

The Act applies only to public lands. The District Court was entirely justified in concluding that the Act is limited to public lands.* Prior to September 27, 1909 oil and gas lands were open to location and entry under the placer mining laws. On September 27, 1909, President Taft by proclamation withdrew large areas of the public lands containing oil and gas from entry and location, "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain." See *United States v. Midwest Oil Co.*, 236 U. S. 459, 467 (1915). Additional areas were withdrawn pursuant to the Pickett Act of June 25, 1910, 36 Stat. 847, which authorized the President to "withdraw from settlement, location, sale, or entry any of the public lands." Congress promptly set to work to provide legislation for the development of the mineral resources of the withdrawn lands.

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*Petitioners assert (p. 7) that the courts below relied "largely upon the use of the words 'public domain' in the title of the Mineral Leasing Act" in concluding that the Act applies only to public lands. Had the courts below chosen to rely primarily on the title, it would have been entirely appropriate to do so under the circumstances present here. *Maguire v. Commissioner*, 313 U. S. 1, 9. However, the fact is that the District Court's conclusion that the Act is limited to public lands was based on the "circumstances which prompted the enactment of this legislation, the legislative history, and the administrative interpretations of the Act" (Jt. App. p. 48).

Bills to provide for a mineral leasing act were considered and debated in every session of Congress between 1914 and the passage of the Act in 1920. Repeated references throughout the reports on these bills make it clear that the Act was intended to apply only to public lands.* When the bill which was destined to become the Mineral Leasing Act of 1920 was introduced in the 66th Congress, Senator Smoot of Utah referred to the legislation as affecting the "public lands" (58 Cong. Rec. 4111), and when the bill was brought to the floor of the House, Chairman Sinnott of the Public Lands Committee made a similar reference (58 Cong. Rec. 7509).

From the earliest administrative construction by Attorney General Stone in 1924 to the present, the consistent administrative practice has been to construe the Act as limited to public lands.** Moreover, in amendments to the Mineral Leasing Act Congress has consistently shown its understanding that the Act is limited to public lands.***

Offshore lands were not public lands within the meaning of the Mineral Leasing Act. At the time of the enactment of the Mineral Leasing Act in 1920 it was generally accepted that lands below the high water mark of the ocean were not public lands of the United States. *Pollard v. Hagan*, 3 How. 212; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284; *Barney v. Keokuk*, 94 U. S. 324, 338. This Court recognized this fact in the *Cali-*

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*H. R. Rep. 668, 63rd Cong., 2d Sess., p. 1; S. Rep. 947, 63d Cong., 3d Sess., pp. 5, 6; H. R. Rep. 17, 64th Cong., 1st Sess.; S. Rep. 319, 64th Cong., 1st Sess.; H. R. Rep. 563, 65th Cong., 2d Sess.; H. R. Rep. 206, 65th Cong., 2d Sess.

**34 Ops. Atty. Gen. 171 (1924); 40 Ops. Atty. Gen. 9 (1941); 60 I. D. 26.

***Act of August 25, 1937, 50 Stat. 808; Act of December 24, 1942, 56 Stat. 1080; Act of August 8, 1946, 60 Stat. 950; Act of June 3, 1948, 62 Stat. 289.

fornia case when it said that in following the doctrine of the *Pollard* case, the Court had "used language strong enough to indicate" that it "then believed that states not only owned tidelands and soil under navigable inland waters but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." 332 U. S. at 36. The intention of Congress in passing the Mineral Leasing Act should be determined on the basis of the contemporary understanding in 1920 that the lands below high water mark are not public lands. See *Lawder v. Stone,* 187 U. S. 281, 293.

The subsequent decisions in *United States v. California,* 332 U. S. 19, and *United States v. Texas,* 339 U. S. 707, holding that the United States has "paramount rights" in the three mile marginal belt, confirm the principle that marginal sea lands are not public lands. In the *California* case, the brief for the United States pointed out (p. 62) that California was admitted to the Union upon the condition that the United States retained ownership of all public lands within the State. 9 Stat. 452. If the Court had considered that the marginal sea came within the category of public lands, this condition of the Act of Admission would have provided a clear and ample ground for the decision. However, the Court declined to adopt the Act of Admission as the foundation of its decision and relied instead on the special responsibilities of the federal government in the marginal belt.

In the *Texas* case the Court had under consideration the joint resolution admitting Texas to the Union which provided that the state "shall also retain all the vacant and unappropriated lands lying within its limits." 5 Stat. 797. On the basis of this joint resolution Texas argued that it was entitled to retain the marginal sea area as

"vacant and unappropriated lands." Since it was conceded that the term "vacant and unappropriated lands" is synonymous and equivalent to "public lands," Texas relied upon *Hynes v. Grimes Packing Co.*, 337 U. S. 86, as authority for its argument that marginal sea lands are public lands and were therefore retained by Texas. However, the Supreme Court refused to sustain Texas' argument that the marginal sea area was retained by her and thus refused to give to the *Hynes* case the effect which was claimed by Texas in that case and which is asserted here by petitioners.

C. Marginal Sea Lands Were Not "Owned" by the United States in the Sense Required for Disposition Under the Act.

In concluding that the Mineral Leasing Act does not apply to the offshore submerged lands, the courts below placed reliance on the fact that it has never been held that the submerged lands were "owned" by the United States in the sense in which that term is used in the Mineral Leasing Act (Jt. App. p. 51).* There is firm support for this view in the three *Marginal Sea* cases in which the United States' paramount rights in these offshore waters were enunciated. *United States v. California*, 332 U. S. 19 (1947); *United States v. Louisiana*, 339 U. S. 699 (1950); *United States v. Texas*, 339 U. S. 707 (1950). The holding of the Court in the *California* case is notable for its studied avoidance of the customary property terms such as "title" or "ownership in fee" and the careful use of the phrase "paramount rights in and power over." 332 U. S. at 38-39. Moreover, after the

*Section 1 of the Act provides that any "deposits . . . and lands containing such deposits owned by the United States" are subject to disposition.

decision, the United States Attorney General petitioned the Court to enter a decree providing that the United States is "possessed of paramount rights of *proprietorship* in, and full dominion and power over" the marginal sea. In keeping with the language of its opinion, however, the Court struck the words "of proprietorship" out of the proposed decree. 332 U. S. 804.

In the opinions and decrees in the *Louisiana* and *Texas* cases the Court again carefully refrained from speaking of the United States' interests in terms of United States ownership and referred instead to the Federal Government's paramount rights and paramount powers, 339 U. S. at 704, 705, 719; 340 U. S. 899, 900. Moreover, the Court in the *Louisiana* case explicitly stated that "the issue in this class of litigation does not turn on title or ownership in the conventional sense." 339 U. S. 699, 704.*

D. Subsequent Legislation and Administrative Construction Indicate That the Mineral Leasing Act Did Not Extend to the Offshore Lands.

The District Court pointed out that Congress has not taken any action to extend the Mineral Leasing Act to the marginal sea lands although it has five times extended the Act to lands not previously within its scope.**

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*The decrees in the *Marginal Sea* cases are to be contrasted with that entered in *United States v. Wyoming*, 331 U. S. 440, which the Court considered contemporaneously with the *California* case. In the *Wyoming* case, where the lands were claimed by the United States as part of the public domain, the judgment decreed that the United States is the "owner in fee." 333 U. S. 835.

**Act of March 4, 1923, 42 Stat. 1448 (certain lands in Red River); Act of June 27, 1930, 46 Stat. 819 (certain lands in Wyoming); Act of May 23, 1934, 48 Stat. 796 (Fort Morgan Military Reservation, Alabama); Act of July 3, 1941, 55 Stat. 577 (certain lands in Niobrara County, Wyoming); Act of August 7, 1947, 61 Stat. 913 (acquired lands).

In one of these acts—the Mineral Leasing Act for Acquired Lands of 1947—Congress expressly excepted "tidelands . . . or submerged lands" from the extended coverage of the Act.* These statutes indicate that Congress is of the view that the Act did not provide for and is not appropriate for the administration of that offshore area.**

Administrative officials charged with construction of the Mineral Leasing Act have without exception ruled that the Act is not applicable to the marginal sea lands.*** In 1946 Secretary of the Interior, Harold L. Ickes, made recommendations for the administration of the marginal belt and stated:

> "Implicit in these recommendations is the thought that the Mineral Leasing Act of 1920 is not applicable to submerged lands. A reading of the act will reveal

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*The District Court said that the Solicitor of the Department of Interior was justified in assuming that "the reason for this exclusion of submerged coastal lands was that the Mineral Leasing Laws, as amended, had not been extended to these areas and that, therefore, they would be covered by the new act unless excluded from its effect" (Jt. App. p. 53). This assumption is borne out by the report of the House Committee on Public Lands with respect to the acquired lands act which states that "It is the judgment of this committee that this bill should not and does not apply to the tidelands or submerged lands, and it is not intended that such lands would be considered as 'acquired lands', as defined by section 2 of this bill." H. R. Rep. 550, 80th Cong., 1st Sess., p. 3.

**That "subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject" is shown by *Great Northern Railway Co. v. United States*, 315 U. S. 262, 276, 277.

***This Court has indicated that administrative practice has particular significance in cases involving the administration by the Interior Department of lands in which the United States has an interest. See *McLaren v. Fleischer*, 256 U. S. 477, 481 (1921); *cf. United States v. Wyoming*, 331 U. S. 440, 446 (1947).

> that in many particulars its provisions would not fit the problems presented in the administration of submerged lands. . . . More importantly, the problem of the submerged coastal lands was not considered when the act was passed, and Congress is entitled to and should fix its policy with specific reference to these lands." (Hearings on H. J. Res. 225 and S. J. Res. 48, 79th Cong. 2d Sess., p. 11.)

After this Court's decision in the *California* case, the Interior Department (60 I. D. 26) and the Attorney General (40 Ops. Atty. Gen. 540) ruled that the Mineral Leasing Act is not applicable to the submerged offshore lands. Moreover, in connection with legislation proposed in Congress for the administration of the marginal belt since 1947, federal officials have consistently maintained that the Mineral Leasing Act did not apply.*

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*Hearings before Senate Interior and Insular Affairs Committee on S. J. Res. 20, 82nd Cong., 1st Sess., p. 29; Hearings before Senate Interior and Insular Affairs Committee on S. J. Res. 195, 81st Cong., 2nd Sess., pp. 5-7, 214; and Hearings before Senate Interior and Insular Affairs Committee on S. J. Res. 13 and other bills, 83rd Cong., 1st Sess., p. 927.

Conclusion.

For each and all of the foregoing reasons it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

The Mineral Leasing Act of February 25, 1920, 41 Stat. 437, provides in pertinent part as follows:

"An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities. . . .

"Sec. 13. That the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field . . . Whether the lands sought in any such application and permit are surveyed or unsur-

veyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby. . . .

"Sec. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit. . . . The area to be selected

by the permittee, shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public-land surveys; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys. . . . The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production, and under such other conditions as are fixed for oil or gas leases in this Act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe. . . .

"Sec. 17. That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same, not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants. . . ."